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July 20, 2001

RECEIVED

JUL 20 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW, Room TWB204
Washington, D.C. 20554

Re: CC Docket No. 80-286
Petition for Reconsideration of
Roseville Telephone Company

Dear Ms. Salas:

On behalf of Roseville Telephone Company, and pursuant to Section 1.429 of the Commission's rules, I hereby enclose an original and nine copies of Roseville's Petition for Reconsideration of the Commission's *Report and Order* in CC Docket No. 80-286 (FCC 01-162, released May 22, 2001).

If there are any questions regarding this matter, please contact me.

Sincerely,



Paul J. Feldman
Counsel for Roseville Telephone Company

PJF:jpg

Enclosure

cc: Mr. Michael Campbell
Mr. Greg Gierczak
Mr. Jack Day
Certificate of Service

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ENCLOSURE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 20 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Jurisdictional Separations and Referral to)
the Federal-State Joint Board)

CC Docket No. 80-286

PETITION FOR RECONSIDERATION

Roseville Telephone Company ("Roseville"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby petitions for reconsideration of the Commission's decision in the Report & Order in the above-captioned proceeding¹ to decline to reduce the local dial equipment minutes ("DEM") level for the base year of its separations freeze, and shift that amount to the interstate DEM. That failure to reduce the local DEM factor, which was contrary to the recommendation of the Joint Board, in effect ignores the substantial growth of Internet traffic on the local network. Such an approach is contrary to Commission policy and rational decision-making, and inappropriately shift costs to the intrastate jurisdiction. Accordingly, the Commission should allow the DEM to reflect the interstate nature of ISP-bound traffic, reduce the local DEM level to reflect actual usage of the network for ISP-bound traffic, and shift that amount to the interstate DEM. While it would not follow the appropriate methodology of reflecting actual usage, at very least, the Commission should acknowledge actual usage of the Internet by reducing the local DEM to a default level

¹ FCC 01-162, released May 22, 2001.

such as that recommended by the Joint Board. In support thereof, the following is shown.

I. Introduction

Roseville is an incumbent local exchange carrier ("ILEC") serving subscribers in 83 square miles, with central office locations serving the Roseville and Citrus Heights, California area. Roseville has been providing high quality communications services to its subscribers for over 85 years, and currently serves approximately 132,000 access lines. As the carrier of last resort for local subscribers, Roseville takes very seriously its obligation to provide high quality local exchange services at a reasonable cost to the end-user. Rational jurisdictional separations policy has an important role in reducing pressure on local rates, and furthering the goal of universal service mandated in the Communications Act and set forth in Commission policy.

Roseville generally supported² the approach suggested by the Joint Board in its July 21, 2000 *Recommended Decision*.³ In that Decision, the Joint Board recommended that the Commission implement an interim freeze of Part 36 category relationships and jurisdictional allocation factors. The Board properly suggested that such a freeze would provide "much needed simplification and stability to the separations process in a time of rapid market and technology changes."

Recommended Decision at para. 1.

² Roseville is an active member of the United States Telecom Association.

³ In re Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, FCC 00J-2, released July 21, 2000 ("*Recommended Decision*").

Most important among the changes in technology that formed the basic rationale for the freeze is the rapid growth in the use of the local network to deliver traffic to the Internet. As the Commission itself noted in para. 39 of the Report and Order, the “Joint Board’s concerns regarding Internet usage stems from the fact that costs for ISP-bound traffic, despite the jurisdictionally interstate nature of this traffic, are booked as intrastate for separations purposes.” Accordingly, the Joint Board recommended that if the Commission finds that Internet traffic is jurisdictionally interstate, then the separations freeze should include a freeze of the local DEM factor “at some substantial portion of the current year level” *Recommended Decision* at para. 2. While the Joint Board sought comments on what would be the appropriate amount by which the local DEM should be reduced, and recognized that it might be difficult to precisely quantify the proper amount, it did not recommend taking no action if complete precision could not be attained at this moment. Rather, it recommended in that case the use of a default level of 95 percent of the current year level. *Id.* at para. 29.

In response on this issue, the Commission acknowledged that it had recently reaffirmed its finding that Internet traffic is jurisdictionally interstate.⁴ It also acknowledged that the record demonstrates “some growth” in local calling patterns, and that it “may be reasonable to assume that some portion of this growth is attributable to increased Internet usage.” *Id.* Nevertheless, the Commission chose not to reduce the local DEM factor, because it believed that it lacked “reliable data” upon which to set an

⁴ Report and Order at para. 40, citing Inter-carrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) at paras. 52-65.

amount for reducing the local DEM. Roseville disagrees with this finding, and asserts that there is indeed reliable data in the record. However, even if there were not enough information for the Commission to establish its own factor, it was irrational policy for the Commission to ignore the actual growth of Internet usage of the network as indicated by the Joint Board.

**II. There is Reliable Evidence in the Record
Upon Which to Base a Rational Reduction in the DEM.**

The Commission laments in paragraph 38 of the Report and Order that while numerous parties have supplied information and estimates of the percentage of intrastate traffic that represents Internet traffic, the estimates vary greatly, and no party provided an explanation, detailed studies or documentation of their results. Roseville respectfully disagrees with this finding.

Roseville points the Commission to the filings made by the National Exchange Carrier Association in this proceeding. NECA's Comments⁵ in response to the *Recommended Decision* referenced the extensive documentation made by parties in this proceeding regarding the amount of usage of the local network attributable to the Internet. Associations Comments at note 7. Those Comments also cited to a 1999 NECA study of 1998 carrier traffic data, revealing Internet usage of approximately 18 percent. Associations Comments at note 18, *citing* October 28, 1999 Letter from Gina

⁵ NECA filed those Comments jointly with the National Telephone Cooperative Association, the National Rural Telecom Association, and the Organization for the Promotion and Advancement of Small Telecommunications Companies (hereinafter, "Associations Comments").

Harrison, NECA to Dorothy Attwood, in CC Docket 80-286 ("*NECA Letter*"). That *Letter* described the information survey used to collect data, and noted the breadth of the data upon which the estimate was made: responses from 155 study areas, and supplemental data provided by consultants for an additional 254 companies.

The data provided by NECA alone provides a reasonable basis for a specific reduction of the local DEM factor. NECA was established by the Commission itself, and is universally recognized for its expertise in separations issues. There was and is no reason to ignore its detailed and specific information. Even if the Commission were not to rely solely on NECA's work, the NECA study is an obvious place to start, and its results could have been modified in light of other persuasive evidence in the record.

Not only does the record clearly provide data reliable enough to make a rational decision regarding an amount by which to reduce the local DEM, but there is a clear need to make such a decision now, given the degree to which Internet traffic skews proper jurisdictional allocation on an on-going basis. The *NECA Letter* stated that treating Internet traffic as intrastate for separations purposes produces a \$170 million allocation of costs to the state jurisdiction just for NECA pool members. The current figure for the entire nation would have to be much greater, since NECA pool members represent less than ten percent of the nation's access lines, and no one disputes that Internet traffic has increased since 1998. This level of misallocation is clearly contrary to the public interest, and should not be allowed to continue. Indeed, the impact is so significant that USTA "implores the Commission not to ignore [Internet traffic], but to include that usage as interstate before the minutes are adjusted and the frozen factors

are calculated.” Comments at page 14.

While the Report and Order attempts to solve the problem by committing to working with the Joint Board “on a continuing basis” to address the impact of Internet traffic, presumably in the context of comprehensive separations reform, that commitment alone is no solution. With all due respect, Roseville notes that the current phase of separations reform has been proceeding for almost four years,⁶ with no prospect of action on the horizon for this critical issue.

Roseville recognizes that no recasted jurisdictional DEM factors, even if based on NECA’s data, could be 100 percent accurate. Yet, this should not be a case where perfection is the enemy of a fair and equitable result. Clearly, a reasonable factor can be developed, and as shown herein and in the record, the public interest requires that some action must be taken now, not at a vague future date. The Commission itself recognized, separations policy does not require precision.⁷ Accordingly, the Commission’s failure to reduce the local DEM, and shift that amount to the interstate DEM, was irrational and bad policy, and should be revised on reconsideration.

III. Even If There Was an Insufficient Record to Select a Different Reduction Factor, the Commission Should Have Enacted a Default Figure.

As shown above, there was reliable evidence in the record upon which to base a reduction in the local DEM factor. However, even if there was not a record sufficient to

⁶ Jurisdictional Separations Reform and Referral to the Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd 22120 (October 1997).

⁷ Report and Order at note 6, *citing* Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 148 (1930).

select a factor different than that recommended by the Joint Board, the rational and required approach for the Commission would have been to enact the default figure established in the *Recommended Decision*.

The Joint Board's recommended freeze of the local DEM factor was conditioned only upon a finding by the Commission that Internet traffic is Interstate for jurisdictional purposes. The Commission has made that finding. Accordingly, the Commission should have enacted at least some reduction in the local DEM, and shifted that amount to the interstate DEM. As noted above, while the Joint Board sought comments on the appropriate amount by which the local DEM should be reduced, and recognized that it might be difficult to precisely quantify the proper amount, the recommended default mechanism did not leave the alternative of no action if the Commission could not obtain absolute precision at this moment. Rather, it recommended in that case at a minimum the use of a default level of 95 percent of the current year level. *Recommended Decision* at para. 29.

The primary explanation in the Report and Order for not adopting the default 5% reduction is the concern that allegedly no party has provided reliable data for the precise amount of Internet traffic. *Id.* At para. 40. Even if this were true (and Roseville asserts that it is not), this would only be a basis for not specifying a factor different than the default figure. It is not a rational basis for not at least using some reasonably reflective default figure.⁸

⁸ While the Commission could have developed a default figure at very least, the preferable approach still would have been to develop a factor that reflects actual Internet usage.

The Commission also attempts to explain the failure to reduce the local DEM by reference to its ESP exemption policy, and by noting that “local switching revenues for ISP-bound traffic continue to be collected on the intrastate side.” *Id.* at para. 41. But these statements provide no basis for the Commission’s decision. First, the fact that ESPs are exempted from paying interstate access charges does not change the interstate nature of the services provided to the ESPs, or the need to recover the cost of those services properly. Second, the only local switching revenues for ISP-bound traffic collected on the intrastate side are those collected from subscribers on measured usage plans. However, the number of such subscribers is limited, as the majority of subscribers are on flat rate plans. Even for those subscribers who have measured usage, those rates were not designed to recover the costs of the long connection times of Internet traffic.

IV. Conclusion

The decision not to reduce the local DEM factor was contrary to the recommendation of the Joint Board, and in effect ignores the substantial growth of Internet traffic on the local network. Such an approach is contrary to Commission policy and rational decision-making, and inappropriately shift costs to the intrastate jurisdiction. There clearly is reliable evidence in the record upon which to base a rational reduction in the local DEM. Accordingly, the Commission should allow the DEM to reflect the interstate nature of ISP-bound traffic, reduce the local DEM level to reflect

actual usage of the network for ISP-bound traffic, and shift that amount to the interstate
DEM.

Respectfully submitted,

ROSEVILLE TELEPHONE COMPANY

A handwritten signature in black ink, appearing to read "Paul J. Feldman", written over a horizontal line.

Paul J. Feldman, Esq.

Its Attorney

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July 20, 2001

CERTIFICATE OF SERVICE

I, Carla Whitlock, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that a true copy of the foregoing *Petition for Reconsideration* was sent this 20th day of July, 2001 by hand to the following:

Dorothy Attwood, Esquire
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW, Room 8-B2011
Washington, DC 20554

Ms. Sheryl Todd
Carrier Bureau Common Policy
Federal Communications Commission
445 12th Street, SW, Room 5-B540
Washington, DC 20554

A handwritten signature in cursive script, reading "Carla Whitlock", written in black ink. The signature is positioned above a horizontal line.

Carla Whitlock